

**No.N/16/7**

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION  
BANGALORE**

**Dated this 10<sup>th</sup> July 2008**

1. Sri K.P.Pandey	..	Chairman
2. Sri S.D.Ukkali	..	Member

**Case No.OP.12/2007**

**Between**

SCM Sugars Ltd. No.61, Residency Road, II Cross, <b>BANGALORE-560025</b>	..	<b>Petitioner</b>
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**And**

1. The Karnataka Power Transmission Corporation Limited, Having its Registered Office at Cauvery Bhavan, Bangalore-09.		
2. Bangalore Electricity Supply Company Ltd., K.R.Circle, Bangalore-01 Represented by its Managing Director	..	<b>Respondents</b>

The Petitioner is a Company registered under the provisions of the Companies Act, 1956.

The Petitioner before the Commission is seeking a direction to the Respondent Corporation to release the payment for the energy supplied exceeding 24 MW during the off season and more than 13 MW during the season.

It is submitted that the Petitioner Company is essentially a sugar factory. The Sugar Factory and the cogeneration plant have been established at Koppa

Village, Maddur Taluk of Mandya District. The Government of Karnataka the 1<sup>st</sup> Respondent herein by an order dated 11.12.2001 gave permission for setting up of co-generation plant at an estimated cost of Rs.13318 lakhs (the cost includes the setting up of sugar factory).

**The Brief Facts of the case are:**

The Respondent No.1 entered into a Power Purchase Agreement in respect of 15 MW capacity plant on 30.3.2001. Since the Petitioner Company obtained an order dated 19.1.2002 from Government of India for the enhanced capacity of the sugar factory and also an order from Respondent No.1 dated 11.12.2001 for the enhanced capacity of Co-gen plant, it further negotiated with the Respondent No.1 and entered into a Supplemental Power Purchase Agreement on 22.03.2002 after obtaining approval of the Draft PPA by this Hon.Commission wherein it was agreed that the Respondent No.1 herein would purchase 13 MW exportable energy during the season (i.e.crushing season) and 24 MW exportable energy during the off-season.

It is submitted that thereafter the Petitioner Company commissioned its project and started generating power with effect from 30.06.2004. The Respondent Corporation in the first instance, was regular in making payments. The Respondent Corporation was honouring the bills raised by the Petitioner Company without imposing ceiling limits on the supply, since from the date of commissioning the project. However, when the Petitioner Company submitted the invoice on 05.04.2005 for the export of the energy to the extent of 15 MW, the Respondent Corporation honoured the bill restricting the amount to the extent of 13 MW. Though the Respondents had received energy to the extent of 15 MW, they limited their payment only upto 13 MW. It is of most relevance to mention that the Respondent Corporation went to the extent of restricting the amount for the months of November, December, January and February. While releasing the amount for the bill dated 05.04.2005, the corporation released the payment withholding the alleged difference amount. The reason assigned was that they

were bound to take only 13 MW during season and 24 MW during off season and the Petitioner had supplied 15 MW during the season, and hence they were not liable to pay the balance for 2 MW.

Meanwhile, attempts were also made by the Petitioner Company to remove the restrictions (Season, off-season) on pumping of energy into the grid by cogeneration plants. In this regard the Company made several representations to the Respondent authorities to remove the same. At the first instance the Respondent Corporation and State Power Procurement Co-ordination Centre exchanged communications and a direction was also issued by this Commission to affect necessary amendments to the Power Purchase Agreement after negotiation. However, no further developments took place and the Corporation went on withholding the amount.

It is submitted that clause 4.2 of the Power Purchase Agreement envisages the obligations imposed upon the Respondent Corporation. Clause 4.2 (iii) of the agreement reads as follows:

“Corporation agrees – subject to system constraints to off-take and purchase all the exportable capacity made available by the Company at the delivery point.”

It is clear from the bare reading of the above clause that the Respondent Corporation is under an obligation to purchase all the exportable energy made available by the Petitioner Company. The action of the Corporation is in clear violation of the agreed terms.

It is submitted that the Petitioner has invested as much as Rs.50.00 crores as on 05.07.2003 and further committed Rs.80.00 crores in the project. Non-payment of the dues not only affect the Petitioner but would also jeopardize the prospects of the various share holders. It has serious consequence not only upon the Petitioner but also on its shareholders. The Petitioner Company is paying huge interests for the said loan amount. It is submitted that the action of the

Respondents in denying payment to the Petitioner Company after admittedly receiving the entire energy to the extent of 15 MW is illegal, constitutes unjust enrichment and therefore a suitable direction is required to be issued.

Being aggrieved by the non-payment of money for the excess power so supplied, without having any alternative and efficacious remedy, the Petitioner Company is before the Commission for appropriate direction, on the following among other grounds.

Under the Agreement, the Respondents have agreed to purchase exportable capacity of the Project. IT is relevant to note that "Exportable capacity" itself has been kept elastic. It reads as under:

**"Exportable Capacity"** means the surplus available Electricity generated by the Project, after providing for captive Electricity consumed by the Company which shall be 13 MW during season and 24 MW during off season"

A bare reading of the above would clearly go to show that the exportable capacity is to be determined with reference to the actual exceeding capacity as on the particular date.

Apart from this, Clause 5.1 which is the operative Clause, reads as under:

**"5.1 Monthly Energy Charges:** Corporation shall for the Delivered Energy pay, for the first years from the date of signing of Agreement, to the Company every month during the period commencing from the Commercial Operation Date on the basis of the base price applicable for the year 1994-95 at the rate of Rs.2.25 (Rupees Two and Twenty five paise) per kilowatt-hour (the tariff) for energy delivered to the Corporation at the Metering Point with an escalation at

a rate of 5% per annum over the tariff applicable for the previous year as per guidelines issued by the Ministry of Non-Conventional Energy Sources of the GOI."

A bare reading of Clause 5.1 would go to show that the respondents are bound to pay to the Petitioner Company the sum mentioned therein for every unit of energy received. In the instant case, admittedly, the Respondents have received energy for which Invoices have been raised. In these circumstances, they are bound to pay the sums so raised under Clause 5.1. Therefore, the reason that deduction made by them refusing to pay on the ground that they are not entitled for excessive energy exported, is unsustainable and requires to be interfered with.

It is further submitted that the Corporation being an instrumentality of State, cannot unjustly enrich itself by refusing to pay the money. It goes without saying that admittedly the Corporation is in receipt of the energy. It has in turn passed on the energy to the consumers and has received money from them. Therefore, the Petitioner Company is to be paid for the said energy. It is not open for them, after having received energy, to say that they would not pay for the same. It is nobody's case that the Corporation has not utilized the said energy or has given it for Grace. Therefore, viewed from any angle, the Respondents are liable to pay to the Petitioner Company money for the energy so received by them.

The Petitioner Company prays to:

- a) Direct the Respondent Corporation to pay to the Petitioner Company a sum of Rs.5,85,00,000/- (Rupees Five Crores Eight Five Lakhs Only) for the energy received which is more fully described in the tabular column at Para No.8 with interest at the rate of 24% calculated from the date the same became due till realization.

- b) Issue such other directions, pass such other orders as deemed fit by the Commission in the facts and circumstances of the case, in the ends of justice.

Notices were issued to both the Petitioner as well as the Respondents. Both have made their appearance through their Counsel. The Respondents have filed their objections to the Petition.

The Petitioner has filed the above petition inter alia, seeking a direction to the Respondents to pay a sum of Rs.5,85,00,000/- (Rupees Five Crores Eighty Five Lakhs only) for the energy received with interest at the rate of 24% calculated from the date the same has become due till realization. It is submitted that the claim of the Petitioner has no basis either on facts or in law. The Petitioner has approached the Commission by suppressing all the material facts. Therefore this Petition is liable to be rejected.

The Petitioner established a co-generation plant at Koppa Village, Maddur Taluk, of Mandya (District) having gross generation capacity of 26 MW with exportable capacity of 24 MW during off season & 13 MW during the season. Initially a gross capacity of 15 MW and exportable capacity of 8.9 MW had been sanctioned by Government of Karnataka by its Notification No.DE 3 NCE 2000 dated 26.02.2000. As per the said sanction, the Petitioner entered into a PPA with KPTCL, the 1<sup>st</sup> Respondent herein on 30.03.2001. However, the Petitioner sought an enhancement of the power plant's capacity to 26 MW and 13 MW exportable capacity during season and 24 MW exportable capacity during off season. Accordingly, the said PPA was modified by supplemental agreement dated 22.03.2002. It is also worthwhile to mention at this juncture that the Petitioner's Cogeneration Power Plant was originally allocated to Chamundeshwari Electricity Supply Company (CESCO) vide its notification dated 06.07.2005. However at the Petitioner's request, the Government of Karnataka vide its notification dated 31.08.2005 allocated the Petitioner's Cogeneration Power Plant to BESCO, the 2<sup>nd</sup> Respondent herein despite the

fact that the same does not come under its geographical area. It is further submitted that the 2<sup>nd</sup> Respondent has been making prompt payments to the Petitioner in terms of the PPA from the date of assigning.

It is submitted that as per the agreed amended recitals as mentioned in the supplemental PPA, "Exportable capacity means the surplus available electricity generated by the project, after providing for captive electricity consumed by the Company which shall be 13 MW during season and 24 MW during off season."

Therefore it was understood that during crushing season the Petitioner will have maximum exportable capacity of 13 MW and during non-crushing season the Petitioner will have maximum exportable capacity of 24 MW. This was a mutually agreed term and legally binding on both the parties to the supplemental agreement. Further the Petitioner vide letter dated 20.09.2004 had also declared the period from November to March as "**Season**" and April to October as "**Off Season**" period.

Article 4.2 (iii) dealing with obligations of the Respondent Corporation states that subject to system constraints to off-take and purchase all exportable capacity made available by the Company at the delivery point and to make payments to the Company as set out in Article 5. Reading Clause 4.2(3) in conjunction with the definition of exportable capacity, the obligation to pay the tariff as contained in Article 5 is only restricted to the exportable capacity as defined. There is no obligation on the part of Respondents 1 & 2 to either off-take power in excess of 13 MW or pay the tariff contemplated under Article 5 for such export in excess of 13 MW.

Thus, as per the terms of the Supplemental PPA and the letter dated 29.09.2004 issued by the Petitioner, the 2<sup>nd</sup> Respondent has made payment during the said season period (between November and March) is legal and in conformity with the MNES guidelines. Hence no fault can be found with.

In view of the foregoing, it is submitted by the Respondent that the present claim of the Petitioner that payment as per Article 5 has to be made for power supplied in excess of 13 MW and that Respondents should continue to pay the same under the PPA are wholly untenable. Therefore the Petition is liable to be rejected.

Now traversing the averments made in the Petition, it is respectfully submitted as under:

RE: PARAS 1 to 6 Need not be traversed.

RE: PARAS 6 & 7

The averment that pursuant to the sanction of the Government of Karnataka for setting up of the Petitioner's Cogeneration Plant, the 1<sup>st</sup> Respondent entered into a Power Purchase Agreement in respect of 15 MW capacity plant on 30.03.2001 is vague and misleading. As submitted earlier at the time of signing of the PPA i.e. on 30.3.2001, The Petitioner plant was sanctioned a gross capacity of 15 Mw with exportable capacity of 8.9 MW.

RE: PARAS 8 & 9

The averment that the Petitioner Company commissioned its project and started generating power with effect from 30.06.2004 is not in dispute. The averment that the Respondent Corporation in the first instance was regular in making payments is true. However the averment that the 1<sup>st</sup> Respondent was honoring the bills raised by the Petitioner without imposing ceiling limits on the power supply since the date of the commissioning the project is totally false and baseless. AS per the amended clause of the Supplemental Agreement dated 22.03.2002, it is very clear that the exportable capacity of 13 MW during the Season and 24 MW during Off Season is a mutually agreed terms and hence legally binding on both the parties. As a consequence of which the Petitioner has also declared the Season Period to be between November and March vide



its letter dated 20.09.2004. Therefore having agreed to the terms and conditions of the PPA and having declared the Season Period the Petitioner is estopped from seeking the removal of the distinction made between Season Period and Off Season Period for the purpose of power procurement. Hence the restrictions for exportable capacity of 13 MW during Season Period and 24 MW during Off Season Period defined in the PPA is in accordance with the MNES guidelines issued by the Government of India which mandates a ceiling of exportable capacity during season & Off Season period for Co-Generation Plants. Therefore for removal of these ceiling limits, it would require re-calculation of tariff as per KERC guidelines.

RE: PARA 10

The understanding of clause 4.2 by the Petitioner is wholly erroneous. Clause 4.2(3) has to be read in conjuncture with definition of exportable capacity under Article 1. The demand of the Petitioner that all the energy supplied has to be taken and paid for is unsustainable and therefore heeding to the said request does not arise. There is no obligation to pay for the excess energy supplied by the Petitioner.

RE:PARAS 11 & 12

The averments in this para are not of any relevance for the purpose of deciding the present case.

RE:GROUNDS

The averment that the action of Respondents is unconstitutional and violation of terms of PPA is baseless. On the contrary, Petitioner has violated terms of PPA by supplying energy in excess of maximum exportable capacity during the Season Period. In view of payment of tariff for the exportable capacity, the contention that Petitioner is put to serious jeopardy and that there are many claims and debt recovery suits against the Petitioner are wholly unsustainable contentions. No material is placed on record in this regard. It is

also submitted that the same does not have any bearing on the question involved in the present proceedings. The averment that exportable capacity is kept elastic is misleading. The elasticity of exportable capacity bears out at maximum of 13 MW during Season Period and 24 MW during Off Season and nothing beyond.

The Petitioner has erroneously interpreted Clause 5.1 of the PPA to enable it to advance its illogical arguments. Clause 5.1 cannot be read in isolation. It is a settled legal principle regarding interpretation of contracts that all terms of a contract would have to be read as a whole. The Clause 5.1 is circumscribed by the provisions contained in Article 1 and 4.2. Further clause 21.2 of KERC (Conditions of Licence for ESCOMs) Regulations 2004 restricts the Respondents from purchasing power beyond the authorization granted by the Commission and beyond the terms of PPA approved by the Commission. In view of the request of various developers, the State Power Procurement Co-ordination Centre vide letter dated 12.09.2006 has requested this Commission to relax the condition of maximum exportable capacity. Pending consideration of the same, the present demand of the Petitioner is wholly unsustainable. Even if such permission is granted by the Commission, it would only be prospective and will not have any bearing so far the present claim is concerned. Therefore the contention that there be no restriction is wholly untenable.

It is further submitted by the Respondents that the 2<sup>nd</sup> Respondent is bound to pay for the delivered energy at exportable capacity as defined under the Supplemental PPA. Accordingly the 2<sup>nd</sup> Respondent is absorbing the energy pumped into its grid and making the payments for the same. It is relevant to mention that the 2<sup>nd</sup> Respondent procures its daily energy requirement from the allocated sources & UI under Inter State ABT. In this scenario, whatever excess energy generated and exported by the Petitioner Company due to its technical problems without the knowledge/consent of the 2<sup>nd</sup> Respondent is absorbed in the grid and treated as "free energy". In the absence of any direction in the PPA with respect to billing of the excess exportable energy, the Respondents are

not obligated to make any payment of the free energy that was pumped into its grid by the Petitioner. Thus the Respondents are not liable to make any payment for the excess energy generated and exported by the Petitioner.

Seen from any angle, the present Petition is bereft of merits and is liable to be dismissed.

All other averments made in petition not specifically traversed herein and contrary to the above wholly denied.

The Commission has considered the facts and the arguments traversed by the Counsels for the Petitioner as well as for the Respondents. During the course of hearing on 15.11.2007 both parties agree to settle the matter and come up to the Commission with a Joint Memo. Subsequently on 10.1.2008 during hearing following Order of proceeding was passed.

"Case called. Counsels present. Counsel for the Petitioner and Respondent submit that the Commission may fix up a suitable tariff for surplus power. They are advised to file a Memo to that effect. Office to work out the proposals for fixing up the tariff."

The staff of the Commission was of the view that the tariff that was payable for the energy over and above 13 MW would be only the variable cost, to take care of the fuel required to generate the surplus power.

The main issue here is to decide whether the energy exported upto 15 MWs during season is surplus or otherwise.

After deliberations in a Commission meeting, it was decided to know the position of the other sugar co-generation plants.

The position with the other sugar co-generation plants was studied. It is observed that in the PPAs approved earlier to 18.8.05 for the sugar co-generation plants, there was a mention of season and off season. But the Commission vide its Order dated 18.8.2005 has approved the model standard PPA for NCE projects. In the model PPA it is defined that exportable capacity means the surplus available electricity generated by the Project after providing for captive electricity consumed by the company which shall be upto.... MWs and there is no mention about the season and off season. There is only one higher exportable capacity mentioned, which will usually be higher during off season when captive consumption is very less.

In case of M.s,SCM Sugar Mills and M/s.Davangere Sugar Mills, the PPAs were entered earlier to 18.08.05. In these two cases the Director(Procurement) SPPCC has requested for removal of restriction about season and off season from pumping of energy into the grid by the co-generation power plants vide letter No.SPPCC/A1/20/05-06/6971-72 dated 12.9.06. He has further stated that KPTCL/ESCOMs do not have any objection if the condition of season and off season is relaxed and the co-generation sugar mills are allowed to pump energy into the grid up to the maximum of their contracted capacity.

The Director, SPPCC, accordingly proposed amendments to these PPAs to bring into the conformity with the approved model PPA. He was directed by the Commission office letter No.S/03/0/1943 dated 27.12.2006 that the respective parties (ESCOMs) to the PPA may be informed to propose the amendments/modifications to the PPA for consideration by the Commission. It is clear from the amendment proposed by the SPPCC that KPTCL/ESCOMs agreed to relax the restriction of season and off season. But the proposal for amendment have not been received from the respective ESCOMs even though they have already utilized the energy pumped in by the SCM Sugar Mills. The highest exportable capacity being 24 MWs the Petitioner has exported only 15 MW well within 24 MWs. The Commission's view is that the energy pumped at 15 MWs cannot be considered here as excess as the plant's higher exportable

capacity is 24 MWs and 15 MWs export is well within the capacity and hence this energy cannot be considered as surplus. The energy exported above 24 MWs shall be considered as excess as per the model PPA approved on 18.8.2005.

It is noted that the Petitioner referred to the Clause 4.2 of the Power Purchase Agreement.

Clause 4.2(iii) of the Agreement reads as follows:

"Corporation agrees – subject to system constraints to off take and purchase all the exportable capacity made available by the Company at the delivery point."

The Petitioner's contention is that there is a flexibility in the Clause to purchase all the exportable capacity and is seeking the Commission to issue directions to the Respondents to release the payment for the energy supplied exceeding 24 MWs during off season and more than 13 MW during the season. The Commission is of the view that the Petitioner is entitled to export upto the overall exportable capacity of 24 MWs and not exceeding 24 MWs.

Under the circumstances, the Respondents are liable to release the Petitioner all the charges as per Article 5.1 of the valid PPA for the 15 MWs of power exported to the Respondents within one month. **So, Ordered.**

Sd/-  
(K.P.PANDEY)  
CHAIRMAN

Sd/-  
(S.D.UKKALI)  
MEMBER





